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Problems Ascertaining the Bare Meaning of Statutes Regulating Adult Entertainment: The Eleventh Circuit Falls Back on the Secondary Effects Doctrine in Ranch House, Inc. v. Amerson

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PROBLEMS ASCERTAINING THE BARE MEANING OF STATUTES REGULATING ADULT ENTERTAINMENT: THE ELEVENTH CIRCUIT FALLS BACK ON THE SECONDARY EFFECTS DOCTRINE IN *RANCH HOUSE, INC. v. AMERSON*

I. INTRODUCTION

"It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[1] One such activity that courts have examined in light of the First Amendment is nude dancing.[2] Although nude dancing has received some First Amendment protection, it has also been subject to laws that restrict it and that have often been upheld as constitutional.[3] This two-sided treatment of nude dancing has blurred the line between what is protected and what is not protected.[4]

Accordingly, resolving the constitutionality of state and local laws that regulate nude dancing has developed into a complex and difficult task for courts.[5] In this evolving analysis, courts have looked to the language of the statute or ordinance at issue and its

1. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570 (1991) (plurality opinion) (quoting City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989)). For a discussion of the Supreme Court's decision in *Barnes*, see *infra* notes 80-86 and accompanying text.

2. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (upholding ordinance regulating public nudity); *Barnes*, 501 U.S. at 566, 569-71 (upholding statute regulating nude dancing while acknowledging First Amendment protection); Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, 997-98 (11th Cir. 1998) (finding ordinance prohibiting nude dancing in places selling liquor does not offend First Amendment); Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 135-36 (6th Cir. 1994) (striking down ordinance banning all public nudity).

3. *See Pap's*, 529 U.S. at 289, 302 (recognizing First Amendment protection for nude dancing despite upholding ordinance regulating public nudity). For an explanation of the decision in *Pap's*, see *infra* notes 89-92 and accompanying text.

4. *See Pap's*, 529 U.S. at 322-23 (Stevens, J., dissenting) (arguing Court's restriction of activity based on harmful secondary effects has grave implications for First Amendment jurisprudence); *see also* Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 HARV. L. REV. 1904, 1920-21 (1989) (discussing confusion surrounding types of nude dancing restrictions).

5. *See* Alan J. Howard, *When Can The Moral Majority Rule?: The Real Dilemma at The Core of The Nude Dancing Cases*, 44 ST. LOUIS U. L.J. 897, 897-98 (2000) (discussing complex issue in *Barnes* of statute's constitutionality in banning public nudity); Erwin S. Barbre, Annotation, *Topless or Bottomless Dancing or Similar Conduct as Offense*, 49 A.L.R.3d 1084, 1087-88 (1973) (explaining difficulty of determining First Amendment protection for nude dancing).

legislative history.[6] This analysis can be complicated, as the legislative purpose in enacting the law may not always be evident.[7] Recently, the Eleventh Circuit engaged in this analysis when it addressed the constitutionality of two regulatory provisions in *Ranch House, Inc. v. Amerson.*[8] In *Ranch House*, the owners of an adult entertainment establishment challenged the constitutionality of two provisions that banned the display of nudity for entertainment purposes and restricted the location of nude entertainment establishments.[9] The Eleventh Circuit held that the legislative purpose of one of the statutes was unclear, and remanded the case to the lower court to determine its constitutionality.[10]

This Note questions the Eleventh Circuit's decision to remand the issue of the statute's constitutionality. Specifically, this Note discusses whether the court gave too much deference to the Alabama Legislature and reviews the Eleventh Circuit's holding and rationale in reaching its decision.[11] Section II of this Note provides the underlying facts of *Ranch House*, while Section III details the complex legal background of First Amendment jurisprudence as-applied to adult entertainment.[12] Section IV examines the Eleventh Circuit's reasoning for its holding in *Ranch House*, and Section V critiques the court's reluctance to decide whether the regulations at issue were constitutional in light of prior case law.[13] Finally, Section VI evaluates the possible ramifications of the court's decision in *Ranch House.*[14]

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6. *See* United States v. O'Brien, 391 U.S. 367, 385 (1968) (evaluating legislators' statements in light of statute's language to determine law's purpose); Colacurcio v. City of Kent, 163 F.3d 545, 552 (9th Cir. 1998) (examining ordinance's face, effect, facts surrounding its enactment and legislature's purpose in adopting ordinance); *see also* Barbre, *supra* note 5, at 1088-89 (discussing idea that courts find statutes vague by looking at their language).

7. *See* SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1273 (5th Cir. 1988) (recognizing difficulty of determining actual purposes of zoning regulations).

8. 238 F.3d 1273 (11th Cir. 2001).

9. *See id.* at 1276.

10. *See id.* at 1280-84, 1288.

11. For a discussion of the Eleventh Circuit's rationale in *Ranch House*, see *infra* notes 98-138 and accompanying text.

12. For a discussion of the facts in *Ranch House*, see *infra* notes 15-24 and accompanying text. For an examination of the background of First Amendment jurisprudence as-applied to adult entertainment, see *infra* notes 25-97 and accompanying text.

13. For a discussion of the court's rationale in *Ranch House*, see *infra* notes 98-138 and accompanying text. For a critique of that rationale, see *infra* notes 139-69 and accompanying text.

14. For a discussion of the potential impact of the Eleventh Circuit's holding in *Ranch House*, see *infra* notes 170-79 and accompanying text.

II. FACTS OF *RANCH HOUSE*

In 1998, the Alabama Legislature amended the Alabama Criminal Code by including two additional statutory provisions aimed at regulating adult entertainment establishments.[15] Section 200.11 bans the display of nudity by a business establishment for entertainment purposes.[16] Included separately, section 200.5(4) prohibits the operation of an "adult-oriented enterprise within 1,000 feet of a church, place of worship . . . private residence, or any other place frequented by minors."[17]

Since 1993, Plaintiff Ranch House, Inc. owned an establishment that offered nude female dancing in Calhoun County, Alabama.[18] The business was located in an unincorporated area of Calhoun County, and a single-family residence was within 1,000 feet.[19] Before sections 200.11 and 200.5(4) became effective, Ranch House brought suit against Defendants Calhoun County Commission and Sheriff Amerson in the United States District Court for the Northern District of Alabama.[20] Ranch House chal-

15. *See* Ranch House, Inc. v. Amerson, 238 F.3d 1273, 1276 (11th Cir. 2001) (citing ALA. CODE §§ 13A-12-200.5(4), 200.11 (Supp. 2001), imposing criminal liability for display of materials harmful to minors and objectionable performances).

16. *See* ALA. CODE § 13A-12-200.11 (Supp. 2001). Section 200.11 states:

> It shall be unlawful for any business establishment or any private club to show or allow to be shown for entertainment purposes the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state. A violation of this section shall be a Class C felony.

Id.

17. ALA. CODE § 13A-12-200.5(4) (Supp. 2001). Section 200.5(4) states:

> It shall be unlawful for any person to operate an adult bookstore, adult movie house, adult video store, or other form of adult-only enterprise within 1,000 feet of a church, place of worship, church bookstore, public park, public housing project, daycare center, public or private school, college, recreation center, skating rink, video arcade, public swimming pool, private residence, or any other place frequented by minors. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than ten thousand dollars ($10,000) and may also be imprisoned in the county jail for not more than one year.

Id.

18. *See* Ranch House, Inc. v. Amerson, 22 F. Supp. 2d 1296, 1298 (N.D. Ala. 1998). The establishment, known as the Platinum Club, was not licensed to sell alcohol in connection with the dancing. *See id.* Ranch House owned a bar called the Platinum Sports Bar, which was located next to the Platinum Club and was licensed to sell beer and wine. *See id.*

19. *See* Ranch House, Inc. v. Amerson, 146 F. Supp. 2d 1180, 1184 (N.D. Ala. 2001) (noting Ranch House fell within parameters of statute).

20. *See Ranch House*, 238 F.3d at 1276. Ranch House also moved for a preliminary injunction against the enforcement of the statutes. *See id.* Upon the parties'

lenged the two statutes as unconstitutional under the First Amendment.[21] The district court upheld the statutes and dismissed Ranch House's complaint.[22] On appeal, the Eleventh Circuit found that the defendants did not prove that section 200.11's purpose was to prevent the harmful secondary effects associated with nude dancing.[23] Accordingly, the court vacated the district court's judgment and remanded to allow the defendants a chance to give an adequate evidentiary showing of the statute's purpose.[24]

III. BACKGROUND

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[25] However, the United States Supreme Court has determined that there are limitations on this freedom.[26] Specifically, the Court has established boundaries for First Amendment protection by holding that certain speech can be regulated depending on its content.[27] This concept of First

stipulation, the district court consolidated the hearing for the preliminary injunction with a trial on the merits. *See id.* The district court then conducted a bench trial with oral argument by counsel. *See id.* at 1276-77.

21. *See Ranch House*, 22 F. Supp. 2d at 1298. Ranch House argued that section 200.11 was a content-based restriction on nude dancing, which is protected expression under the First Amendment. *See id.* It also contended that section 200.5(4) facially violated the First Amendment because it was "overbroad, vague and without proper foundation." *See id.*

22. *See Ranch House*, 238 F.3d at 1277. The district court first determined that section 200.11 was a content-neutral restriction designed to combat the secondary effects of nude dancing. *See id.* The court then applied intermediate scrutiny to determine section 200.11's constitutionality. *See id.* (applying test set forth in United States v. O'Brien, 391 U.S. 367 (1968)). The district court concluded that section 200.11 survived intermediate scrutiny because the statute did not "unreasonably diminish the expressive content of nude dancing." *Id.* The court also determined that section 200.5(4) was facially valid and not overbroad or vague. *See id.*

23. *See id.* at 1284. The court also left open the issue of section 200.5(4)'s constitutionality for the district court. *See id.* at 1287.

24. *See id.* at 1288. The court also continued the injunction granted upon motion by Ranch House before the appeal. *See id.* The injunction prohibited the enforcement of the statutes with respect to Ranch House's businesses. *See id.*

25. U.S. CONST. amend. I. The Supreme Court has determined that First Amendment guarantees are extended to the states through the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding freedom of speech and press extended to states through Fourteenth Amendment).

26. *See* Schenck v. United States, 249 U.S. 47, 52-53 (1919) (restricting free speech and establishing Justice Holmes' "clear and present danger" doctrine). In *Schenck*, Justice Holmes set forth a test for the permissible punishment of speech. *See id.* at 52. Under the test, speech could be punished if the words are used so "as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.*

27. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (establishing modern doctrine for free speech analysis). In *Brandenburg*, the Court

Amendment "speech" has been extended to include certain types of expressive conduct.[28] For example, the Court held that the burning of the American Flag amounted to expressive conduct and could be permissible conduct if burned as a political statement.[29] The Court has given similar treatment to nude dancing, entitling it to some protection under the First Amendment.[30]

Because the Supreme Court has granted nude dancing only limited First Amendment protection, state and local governments may enact legislation that restricts adult entertainment.[31] In order to determine whether these restrictions violate First Amendment guarantees, courts must engage in a comprehensive analysis.[32]

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struck down an Ohio statute that forbade the advocacy of violence "as a means of accomplishing industrial or political reform." *Id.* at 448. The Court modified Justice Holmes' test by developing a new test for restricting free speech. *See id.* at 447. Under the modified test, speech could be proscribed only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.; see also* Miller v. California, 413 U.S. 15, 18-20 (1973) (finding obscene materials unprotected and establishing test for obscenity); Cohen v. California, 403 U.S. 15, 26-27 (1971) (holding offensive language protected by First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942) (holding "fighting words" unprotected class of speech under First Amendment); Note, *supra* note 4, at 1905-06 (explaining analysis courts use to determine what content can be regulated).

28. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (explaining symbolism can be effective way to express ideas); *see also* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (establishing basic analysis for restricting expressive conduct).

29. *See* Texas v. Johnson, 491 U.S. 397, 406 (1989) (declaring flag burning to be expressive conduct protected by First Amendment); *see also* Spence v. Washington, 418 U.S. 405, 409-10 (1974) (holding act of displaying flag with peace sign attached was protected by First Amendment); Stromberg v. California, 283 U.S. 359, 369-70 (1931) (holding act of waiving red flag in public place symbol of opposition to government to be protected by First Amendment); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3, 794-804 (2d ed. 1988) (discussing types of conduct found protected by First Amendment).

30. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion). In *Barnes*, the Court concluded that nude dancing was expressive conduct marginally within the outer perimeters of the First Amendment. *See id.* The Court, therefore, awarded nude dancing some protection as free expression. *See id.; see also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (recognizing First Amendment protection for nude dancing).

31. *See Barnes*, 501 U.S. at 567-68 (permitting state restriction on nude dancing); Carol A. Crocca, Annotation, *Validity of Ordinances Restricting Location of "Adult Entertainment" or Sex-Oriented Businesses*, 10 A.L.R.5th 538, 553-55 (1993) (discussing First Amendment jurisprudence for zoning ordinances regulating adult businesses).

32. *See O'Brien*, 391 U.S. at 377 (providing required judicial analysis for First Amendment protection of expressive conduct); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 50-54 (1987) (discussing approaches courts use to determine protection for content-based and content-neutral restrictions); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615,

A. First Amendment Free Expression Analysis

The first question courts must address when evaluating a law's constitutionality under the First Amendment is whether the law is intended to regulate an activity because of its content.[33] If a regulation seeks to suppress free expression because of the message conveyed, it is considered "content-based" and is subject to a more demanding level of scrutiny.[34] The government must then show a compelling interest, and the regulation must be narrowly tailored to achieve that interest.[35] If the regulation's purpose is unrelated to the suppression of free expression, then the regulation is considered "content-neutral" and is subject to a less stringent standard.[36]

Once a court has determined whether the law is content-based or content-neutral, the appropriate test must then be applied.[37] In *United States v. O'Brien*,[38] the Supreme Court set forth a test that is used by courts to determine whether laws regulating free expression are constitutional.[39] Under this test, a regulation conforms

621 (1991) (discussing variety of tests used in First Amendment content distinction analysis).

33. *See O'Brien*, 391 U.S. at 376-77 (requiring examination of law's underlying purpose).

34. *See Johnson*, 491 U.S. at 403 (explaining rationale for holding law restricting flag desecration content-based and inconsistent with First Amendment). In *Johnson*, the Court determined that a Texas statute prohibiting flag burning was related to the suppression of free expression (i.e. content-based) and was subject to "the most exacting scrutiny." *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)); *see also* Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 553-55 (2000) (defining content-based regulations as aiming at communicative impact of speech); Stone, *supra* note 32, at 47-48 (discussing idea that content-based restrictions on valued speech are often struck down regardless of test used).

35. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000). In *Playboy*, the Supreme Court struck down a federal law that regulated adult programming on cable television. *See id.* at 827. The Court found that the law was content-based because it was focused only on the impact the adult programming would have on its listeners. *See id.* at 811-12 (citing *Boos*, 485 U.S. at 321). Accordingly, the Court applied strict scrutiny to the law and found that the law was not narrowly tailored to achieve a compelling governmental interest because a less restrictive alternative was available. *See id.* at 816-17.

36. *See Johnson*, 491 U.S. at 403 (discussing standard set forth in United States v. O'Brien, 391 U.S. 367, 377 (1968)); Stone, *supra* note 32, at 48-50 (explaining content-neutral restrictions limit expression without aiming at communicative impact of message).

37. *See* Note, *supra* note 4, at 1905-06 (discussing appropriate tests to be applied for content-based and content-neutral regulations); Stone, *supra* note 32, at 47-50 (explaining differences between content-based and content-neutral regulations).

38. 391 U.S. 367 (1968).

39. *See id.* at 377 (explaining method of reviewing laws restricting First Amendment freedoms).

with the First Amendment if: 1) it is within the constitutional power of the government; 2) it furthers an important governmental interest; 3) the government's interest is not related to suppressing expression; and 4) the restriction is no greater than necessary to further the interest.[40] Applying this test, the Court upheld a statute that prohibited the mutilation of Selective Service registration certificates.[41] The Court later determined that the *O'Brien* test is similar to the test for time, place and manner restrictions.[42]

Laws that are not related to the suppression of expression but instead restrict the time, place and manner of the expression have often been upheld as constitutional.[43] A time, place and manner regulation is constitutionally valid provided that it: 1) is content-neutral; 2) is narrowly tailored to serve a significant governmental interest; and 3) leaves open ample alternative channels for communication.[44]

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40. *See id.* (setting forth four-part test for analyzing constitutionality of regulations restricting free expression). This standard is less stringent than strict scrutiny and is used for content-neutral regulations. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 285 (2000) (plurality opinion) (holding statute requiring nude dancers to wear "G-strings" content-neutral and subject to *O'Brien* test). This analysis is often referred to as the intermediate scrutiny analysis. *See* 16A AM. JUR. 2D *Constitutional Law* § 460 (1998).

41. *See O'Brien*, 391 U.S. at 385 (holding statute justified in suppressing conduct at issue under four-part test). The Court reasoned that the Government had a substantial interest in restricting the destruction of Selective Service certificates. *See id.* at 382. Also, the interest was limited to the non-communicative aspect of O'Brien's conduct; thus, it was unrelated to the suppression of expression. *See id.* Finally, the Court found that the statute was a narrow means of protecting the interest, because no other alternative means were available to the Government. *See id.*

42. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984) (noting time, place and manner restriction standard differs little from *O'Brien* test). In *Clark*, the National Park Service issued a permit to the Community for Creative Non-Violence ("CCNV") to allow it to conduct demonstrations in two national parks in Washington, D.C. *See id.* at 291-92. CCNV wished to sleep overnight in tents as part of the demonstration, but the National Park Service denied this request because a regulation prohibited sleeping in those areas. *See id.* at 292. CCNV challenged the regulation, but the Court upheld it as a valid time, place and manner regulation. *See id.* at 298-99. The Court noted that the outcome would be the same under both the *O'Brien* test and the time, place and manner standard. *See id.*

43. *See* Hill v. Colorado, 530 U.S. 703, 725-26 (2000) (holding statute restricting protests within 100 feet of health care facility valid time, place and manner regulation); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994) (upholding injunction creating thirty-six-foot buffer zone between abortion protesters and clinic because it "burden[ed] no more speech than necessary"); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (holding regulation restricting expression in non-public forum need only be reasonable and not means to restrict to restrict expression over disagreement with speaker's viewpoint).

44. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (setting forth test for time, place and manner regulations). In *Ward*, a New York City law regu-

When challenging these nude dancing restrictions, parties may assert that they are either facially unconstitutional or unconstitutional as-applied to them.[45] In a facial challenge, parties may allege that these laws are either overbroad or vague and therefore unconstitutional.[46] A law may be struck down as overbroad if it effectively regulates both unprotected and protected conduct.[47] A law is impermissibly vague when "men of common intelligence must necessarily guess at its meaning and differ as to its application."[48]

In sum, the analysis of regulations that distinguish between nude and clothed entertainment primarily consists of the application of the *O'Brien* intermediate level of scrutiny test, so long as the regulation is not content-based, but rather is justified without reference to speech.[49] To determine whether a regulation's purpose

lated the volume of musical performances at concerts in Central Park. *See id.* at 784-85. The Supreme Court upheld the law as a valid time, place and manner regulation of expression. *See id.* at 803. The Court determined that the regulation was content-neutral because it was unrelated to the content of the regulated speech. *See id.* at 792. Also, the Court found the regulation to be narrowly tailored to serve the city's interest of protecting its citizens from unwelcome noise, because the regulation served that interest in a direct and effective way. *See id.* at 796-800. Finally, the Court explained that the regulation left open ample alternative channels of communication because it did not aim at banning any given manner of expression. *See id.* at 802.

45. *See* Ward v. County of Orange, 217 F.3d 1350, 1356 (11th Cir. 2000), *cert. denied*, 531 U.S. 1149 (2001) (upholding zoning ordinance requiring club owner to obtain license to be facially constitutional time, place and manner regulation but remanding to allow club owner to bring as-applied challenge).

46. *See id.* at 1353-57. In *Orange*, the owner of a "swimsuit club" argued that the Orange County Adult Entertainment Code, which required all adult performance establishments to obtain an adult entertainment license, was unconstitutional both facially and as-applied. *See id.* at 1352. Addressing the facial challenge, the Eleventh Circuit upheld the district court's finding that the ordinance was a valid time, place and manner regulation. *See id.* at 1353-54. The Eleventh Circuit remanded the issue of whether the as-applied challenge was ripe, because the owner never applied for a license. *See id.* at 1356. The Eleventh Circuit maintained that in order for an as-applied challenge to be ripe, "a county official 'with sufficient authority must have rendered a decision regarding' the party's proposal." *Id.* (quoting Digital Props., Inc. v. City of Plantation, 121 F.3d 586, 590 (11th Cir. 1997)).

47. *See* City of Houston v. Hill, 482 U.S. 451, 466-67 (1987) (striking down as overbroad ordinance making it unlawful to interrupt police officer in midst of duties).

48. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (striking down law regulating wage rates because statute was vague in defining meaning of "current rate of wages" and "locality").

49. *See* Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, 998 (11th Cir. 1998) (upholding ordinance prohibiting nude dancing in places that sell liquor). In *Sammy's*, the court applied the *O'Brien* intermediate level of scrutiny test to the secondary effects analysis of *City of Renton v. Playtime Theatres, Inc.* *See* 140 F.3d at 1998. For a full discussion of the *Renton* decision and the secondary effects doctrine, see *infra* notes 65-69 and accompanying text. The court found that the ordinance at issue was aimed at the harmful secondary effects of nude dancing in

was unrelated to expression or solely directed at suppressing the expression, courts will review the full record to find the legislative intent.[50]

B. Laws Regulating Adult Entertainment

Although numerous laws exist that affect adult entertainment, two types of laws that impact the protection given to adult entertainment are zoning laws and laws that restrict obscene performances.[51] These laws have been generally upheld as valid exercises of police power, designed to provide for the public's health, safety and welfare.[52]

1. *Zoning Laws*

Zoning laws generally restrict the location of adult businesses by imposing spacing requirements between these businesses and other premises.[53] Although not required by the Constitution, these laws may include amortization periods or grandfather clauses that allow existing, non-conforming businesses a chance to conform to

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places selling alcohol because the preamble of the ordinance explicitly stated that the combination of the two "encourage[d] undesirable behavior and [was] not in the interest of the public health, safety, and welfare." *Sammy's*, 140 F.3d at 997.

50. *See* Colacurcio v. City of Kent, 163 F.3d 545, 552 (9th Cir. 1998). The court in *Colacurcio* stated that in order to determine a statute's purpose, it would "rely on all 'objective indicators of intent,' including the 'face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings.'" *Id.* (quoting City of Las Vegas v. Foley, 747 F.2d 1294, 1297 (9th Cir. 1984)).

51. For a comprehensive discussion of zoning laws, see *infra* notes 53-71 and accompanying text. For an in-depth discussion of obscenity laws, see *infra* notes 72-97 and accompanying text.

52. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality decision) (noting police authority to uphold public indecency statutes); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71-73 (1976) (concluding cities may enact zoning ordinances to preserve character of neighborhoods); Crocca, *supra* note 31, at 554 (noting zoning regulations as valid exercises of police power); *see also* Brian J. Pollock, Note, *The Government May Institute a Total Ban on Public Nudity in Order to Combat the Secondary Effects Associated With Adult Entertainment Establishments*—City of Erie v. Pap's A.M., *120 S.Ct. 1382 (2000)*, 11 SETON HALL CONST. L.J. 151, 161-63 (2000) (discussing zoning ordinances and outright bans on display of nudity).

53. *See* Crocca, *supra* note 31, at 553 (explaining general purpose of zoning ordinances as restricting location of adult businesses). Zoning ordinances are a device that state and local governments can use to regulate nude dancing. *See* Lisa Malmer, Comment, *Nude Dancing and The First Amendment*, 59 U. CIN. L. REV. 1275, 1295-96 (1991). Traditionally, zoning laws are only valid if the government can show that its interference with private land use is substantially related to the furtherance of the public's general welfare. *See id.* at 1296.

the zoning requirements.[54] First Amendment rights are implicated when a zoning law restricts the location of an adult establishment.[55]

In *Young v. American Mini Theatres, Inc.*,[56] a zoning ordinance restricted the operation of adult movie theaters or similar adult establishments within 1,000 feet of a residential area.[57] In a plurality opinion, the Supreme Court determined that it was acceptable to distinguish between theaters showing adult-oriented films and those showing other films.[58] Consequently, the Court upheld the ordinance as constitutional because it was not aimed at suppressing free expression, but instead at preserving the character of Detroit's neighborhoods.[59]

Conversely, in *Schad v. Borough of Mt. Ephraim*,[60] the Court struck down a zoning ordinance that prohibited the display of live nude dancing in all establishments within the borough.[61] The Court found that the ordinance was not a reasonable time, place and manner restriction because the borough did not identify its in-

54. *See* David Vincent, Inc. v. Broward County, 200 F.3d 1325, 1332 n.11 (11th Cir. 2000) (noting Constitution does not require grandfather clauses, but courts have upheld regulations with amortization periods). A grandfather clause allows an existing, non-conforming business to remain despite the requirements of the ordinance. *See* Jay M. Zitter, Annotation, *Validity of Provisions for Amortization of Non-conforming Uses*, 8 A.L.R.5th 391, 406 (1992) (discussing conflicts between individual's interests and society's interests with non-conforming uses). An amortization period in a zoning ordinance allows a grace period for non-conforming uses to adjust to the zoning requirements. *See id.* at 406-07. Courts look at the burden on the existing non-conforming businesses to determine whether the amortization period is reasonable. *See* Ebel v. City of Corona, 767 F.2d 635, 639 (9th Cir. 1985).

55. *See* Crocca, *supra* note 31, at 554-55. Courts must decide whether zoning ordinances violate the First Amendment because adult entertainment is entitled to some First Amendment protection. *See Barnes*, 501 U.S. at 566.

56. 427 U.S. 50 (1976).

57. *See id.* at 52. Detroit adopted restrictive ordinances in response to the increase in the number of adult establishments in certain areas. *See id.* at 54-55. Such ordinances, which were prompted by a finding from the Detroit Common Council, were intended to address the problems of adversely affected property values and increased crime. *See id.*

58. *See id.* at 70-72. The Court felt that although the First Amendment does not tolerate the total suppression of erotic expression, society has a lesser interest in protecting this kind of expression when compared to other protected expression, such as untrammeled political debate. *See id.* at 70.

59. *See id.* at 72-73. In his opinion, Justice Stevens wrote that the "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Id.* at 71. The Court added that the ordinance was justified because the city relied on the studies performed by the Detroit Common Council. *See id.*

60. 452 U.S. 61 (1981).

61. *See id.* at 76. In *Schad*, the owners of an adult bookstore were convicted for violating Mount Ephraim's zoning ordinance by providing a coin-operated machine that allowed viewers to watch a nude dancer perform. *See id.* at 62-64.

terests for excluding the entertainment.[62] Had the borough shown that the live entertainment was incompatible with the normal activity of the commercial zone, the ordinance may have been validated.[63] Nonetheless, the Court concluded by noting that the borough did not leave open adequate alternative channels of communication because the ordinance excluded both obscene and non-obscene nude entertainment.[64]

A few years after *Schad*, in *City of Renton v. Playtime Theatres, Inc.*,[65] the Court dealt with a zoning ordinance similar to the one in *Young*.[66] The Court found that the ordinance was a content-neutral regulation aimed at furthering an important governmental interest by preventing the harmful secondary effects that adult movie theaters may have on neighborhoods.[67] The Court explained that the city did not need to conduct studies to prove the ordinance was aimed at these negative secondary effects, but the city could reasonably rely on the findings of other cities.[68] The Court concluded

62. *See id.* at 73-75. The Court first noted that the ordinance "prohibit[ed] a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments." *Id.* at 65. The Court then distinguished the case from the *Young* holding, wherein the city had presented sufficient evidence to justify its regulation of First Amendment guarantees. *See id.* at 71-72.

63. *See id.* at 75. The Court explained that to determine the reasonableness of these regulations, the question was whether the expression was basically incompatible with the normal activity of the commercial zone. *See id.* (citing Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972)). According to the Court, this question could not be answered because the borough failed to produce evidence showing this expression was incompatible with the normal activity of the area. *See id.*

64. *See id.* at 75-76. The Court again cited *Young* because in that case the city only restricted obscene materials by merely dispersing them, not by banning them altogether. *See id.* at 71-72.

65. 475 U.S. 41 (1986).

66. *See id.* at 43. In *Renton*, the zoning ordinance prohibited adult movie theaters from being located within 1,000 feet of family residences, churches, parks or schools. *See id. Cf.* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 72-73 (upholding ordinance prohibiting adult theaters from locating within 1,000 feet of any other regulated uses or within 500 feet of residential area).

67. *See Renton*, 475 U.S. at 48, 50-51. The Court answered the question of whether the Renton ordinance was aimed at serving a substantial governmental interest and allowed for reasonable alternative avenues of communication in the affirmative. *See id.* at 50. *But cf.* Boos v. Barry, 485 U.S. 312, 329 (1988). In *Boos*, the Court held that a statute prohibiting the display of any sign within 500 feet of a foreign embassy, which would tend to bring the foreign government into "public disrepute," was 1) content-based and 2) not narrowly tailored to serve a substantial governmental interest. *See id.* at 321, 329.

68. *See Renton*, 475 U.S. at 51-52. Because the City of Renton did not conduct studies specifically relating to the city's problems, the appellate court ruled that the city's justifications were speculative. *See id.* at 50. The Supreme Court felt that requiring the city to conduct new studies would impose an "unnecessarily rigid burden of proof" on the city. *See id.*

that the ordinance left reasonable alternative avenues of communication, and accordingly upheld the ordinance as constitutional.[69]

The *Renton* decision, along with the *Schad* decision, provided arguments for and against the use of zoning ordinances to restrict expression after the plurality in *Young*.[70] Subsequently, many circuit courts have disagreed on the constitutionality of similar zoning ordinances as time, place and manner restrictions.[71]

2. *Obscenity Laws*

Owners of adult entertainment establishments and nude dancers may be prosecuted under laws that prohibit the display of obscene conduct.[72] These laws typically restrict either the indecent exposure of particular body parts, or other lewd or obscene behavior.[73]

The Supreme Court decided that obscenity may be regulated because of its "constitutionally proscribable content," so long as the government does not discriminate against the obscenity solely because of a disagreement with its content.[74] In the past, the Su-

69. *See id.* at 53-54. The Court noted that because the ordinance left open 520 acres of the land area in Renton for the business owners to use, it left open reasonable alternative avenues of communication. *See id.* at 53.

70. *See* Note, *supra* note 4, at 1911 (noting amount of protection given to adult entertainment after *Schad* and *Renton* decisions remains unclear).

71. *See, e.g.*, Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858, 861-63 (8th Cir. 1994) (holding ordinance that expressly addressed harmful secondary effects of adult businesses complied with First Amendment); Int'l Eateries of Am., Inc. v. Broward County, 941 F.2d 1157, 1161-65 (11th Cir. 1991) (finding ordinance similar to one in *Renton* satisfied Supreme Court's standard set forth in *Renton*); SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1273, 1276 (5th Cir. 1988) (upholding ordinance imposing licensing and zoning requirements on adult businesses).

72. *See* Barbre, *supra* note 5, at 1088-90 (discussing ordinances prohibiting obscene or indecent exposure).

73. *See id.* at 1088-89. According to Barbre, nude dancers have been prosecuted under two types of laws: 1) laws that prohibit the indecent or obscene exposure of a person's body parts, and 2) laws that prohibit lewd or obscene conduct without reference to the person's body parts. *See id.* Barbre further explains that the question under both types of laws is whether the dancer's performance amounts to obscenity. *See id.* at 1089. For a discussion of the Supreme Court's test for obscenity, see *infra* note 77 and accompanying text.

74. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992). In *R.A.V.*, the Supreme Court struck down a law prohibiting hate speech based on race, religion, color, creed or gender because it was impermissibly content-based. *See id.* at 381. In his majority opinion, Justice Scalia wrote that if the government discriminates against an entire class of speech, such as obscenity, solely because the content is proscribable (e.g. fighting words), then this reason is neutral enough to justify excluding that speech from First Amendment protection. *See id.* at 388. The government, however, may not prohibit speech solely based on the idea or subject addressed. *See id.* at 393-94. Justice Scalia explained that states may "choose to

preme Court consistently held that obscenity was not entitled to First Amendment protection.[75] In *Miller v. California*,[76] the Supreme Court developed the modern definition of obscenity.[77] Generally, if material is obscene, states may prohibit the display of that material to protect the public health, safety and morals, so long as the regulation or prohibition is not content-based.[78]

The Supreme Court has decided that nude dancing is not unprotected obscene conduct, but rather is entitled to some protection.[79] In *Barnes v. Glen Theatre, Inc.*,[80] the Supreme Court determined that nude dancing is expressive conduct that margin-

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prohibit only that obscenity which is the most patently offensive *in its prurience — i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages." *Id.* at 388 (citation omitted).

75. *See* Roth v. United States, 354 U.S. 476, 485 (1957). In *Roth*, the Supreme Court addressed the constitutionality of a criminal obscenity statute that prohibited the mailing of obscene materials. *See id.* at 479 n.1. Roth challenged the constitutionality of the statute following conviction. *See id.* at 480. After holding that obscenity is not protected under the First Amendment, the Court set forth the test for obscenity. *See id.* at 485, 489. The question to be asked was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489.

76. 413 U.S. 15 (1973).

77. *See id.* at 24-25. In *Miller*, the defendant engaged in a mass-mailing campaign to promote the sale of books containing adult material. *See id.* at 16. He was convicted under a California statute for knowingly distributing obscene matter. *See id.* at 16-17. In reviewing the conviction, the Supreme Court redefined the standard for determining whether material is obscene. *See id.* at 24-25. The Court began by citing the test set forth in *Roth* and then developed the test for obscenity to be:

> (a) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

78. *See R.A.V.*, 505 U.S. at 393-94 (explaining government may proscribe obscenity but not solely because of disagreement with message conveyed); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion) (citing *Roth* to explain that state legislatures may act to protect interests of order and morality); Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, 995-97 (11th Cir. 1998) (explaining government may prohibit nude dancing where liquor is sold because valid exercise of police power).

79. *See Barnes*, 501 U.S. at 565-66 (declaring nude dancing protected activity under First Amendment); City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (citing *Barnes* to declare nude dancing expressive conduct, although merely being in state of nudity is not expressive). For a further discussion of the Court's holding and rationale in *Pap's*, see *infra* notes 89-92 and accompanying text.

80. 501 U.S. 560 (1991) (plurality opinion).

ally comes within the scope of First Amendment protection.[81] In the plurality opinion, the Court addressed the constitutionality of a public indecency statute that required nude dancers to wear "pasties" and "G-strings."[82] The Court applied the *O'Brien* test to uphold the statute as a justified attempt at furthering a substantial governmental interest in protecting order and morality.[83]

In his concurring opinion, Justice Souter disagreed with the plurality's assertion that the statute was justified in protecting society's moral views, arguing that the statute was instead justified because it aimed at preventing the negative secondary effects of nude dancing.[84] Justice Scalia also concurred in the judgment, but wrote separately to argue that the statute was justified because it was not directed at the expression and, therefore, the First Amendment was inapplicable.[85] Writing for the dissent, Justice White argued that the statute's requirements were directly aimed at suppressing free

81. *See id.* at 565-66. The Court stated that nude dancing is "expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Id.* at 566. The Court then determined the applicable question was what level of protection should be afforded to the expressive conduct. *See id; see also* Timothy M. Tesluk, Comment, Barnes v. Glen Theatre: *Censorship? So What?*, 42 CASE W. RES. L. REV. 1103, 1105-06 (1992) (discussing Barnes decision and defining nude dancing as "symbolic speech").

82. *See Barnes*, 501 U.S. at 563. In *Barnes*, two adult entertainment businesses argued that an Indiana statute requiring dancers to wear "pasties" and "G-strings" was an infringement on the First Amendment's guarantee of freedom of expression. *See id.* One business sold alcoholic beverages and desired to present totally nude dancing, while the other was a bookstore that sold adult entertainment through printed material, movie showings and nude performances seen through glass panels in the store. *See id.* Both filed suit arguing that the statute's complete ban on nudity was unconstitutional. *See id.* at 563-64. The district court ultimately ruled for the defendants, but the Seventh Circuit reversed and held that the statute was an improper infringement on nude dancing, which was protected expressive conduct under the First Amendment. *See id.* at 564-65.

83. *See id.* 567-68. In applying the *O'Brien* test, the Court first determined that the statute was "within the constitutional power of the State" and was aimed at "further[ing] a substantial governmental interest." *Id.* at 567. Next, the Court found that the government's interest in protecting order and morality was unrelated to the suppression of expression. *See id.* at 569-70. Finally, the Court decided that the statute was narrowly tailored to achieve the governmental interest because the requirement that dancers wear the "pasties" and "G-strings" would not deprive the dance of the message it conveys. *See id.* at 571-72.

84. *See id.* at 582 (Souter, J., concurring). Justice Souter opined that Indiana's interest in preventing criminal activity was sufficient to satisfy the *O'Brien* test. *See id.* at 583. He added that it did not matter that Indiana failed to articulate its purpose in enacting the statute because the state did not need to show affirmative evidence of its desire to prevent these negative effects. *See id.* at 582-85.

85. *See id.* at 572 (Scalia, J., concurring). Justice Scalia felt that the regulation was not subject to First Amendment scrutiny because it was a general regulation of conduct not directed at protected expression. *See id.*

expression; therefore, he asserted, the plurality was incorrect to uphold the statute as constitutional.[86]

Because no opinion in *Barnes* commanded a majority, lower courts have had to determine the proper analysis to follow.[87] Many circuit courts have decided to rely on Justice Souter's concurring opinion because it was the narrowest of the four.[88]

Years after the *Barnes* decision, the Supreme Court considered the constitutionality of a statute banning public nudity in *City of Erie v. Pap's A.M.*[89] In another plurality opinion, the Court recognized that the ordinance placed a general ban on all nudity, regardless of whether the nudity would have an expressive message.[90] As the Court did in *Barnes*, it upheld the ordinance as a valid content-neutral restriction because it targeted the harmful secondary effects of adult entertainment establishments.[91] Consequently, the *Pap's*

86. *See id.* at 592-93 (White, J., dissenting). Justice White argued that dancers were required to wear the "pasties" and "G-strings" under the statute because of the nature of the performances. *See id.* at 592. Therefore, he believed the statute was related to the expression. *See id. See also* Tesluk, *supra* note 81, at 1121-22 (discussing negative implications *Barnes* has on free expression).

87. *See* J & B Entm't, Inc. v. City of Jackson, 152 F.3d 362, 370 (5th Cir. 1998) (debating which opinion in *Barnes* to use for ordinances banning public nudity).

88. *See id.* (citing Marks v. United States, 430 U.S. 188, 193 (1977), because holding of fragmented cases must be taken by members who concurred in narrowest grounds); Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 133-36 (6th Cir. 1994) (relying on Justice Souter's concurrence in *Barnes* to strike down as overbroad public indecency ordinance that banned all public nudity); Int'l Eateries of Am., Inc. v. Broward County, 941 F.2d 1157, 1160-61 (11th Cir. 1991) (adopting Justice Souter's concurrence because narrowest and closest to secondary effects analysis in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986)).

89. 529 U.S. 277, 282-83 (2000) (plurality opinion). In *Pap's*, the city of Erie, Pennsylvania enacted a public-indecency ordinance that made it a summary offense to knowingly or intentionally appear in public in a "state of nudity." *See id.* at 283. Due to the ordinance, nude dancers were forced to wear "pasties" and "G-strings." *See id.* at 284. A corporation that operated a nude dancing establishment challenged the constitutionality of the ordinance and filed for a permanent injunction against its enforcement. *See id.*

90. *See id.* at 290 (citing *Barnes*, 501 U.S. at 568). The plurality also pointed to the preamble of the ordinance that stated the regulation was adopted "for the purpose of limiting a recent increase in nude live entertainment within the City, which adversely impacts and threatens to impact on public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, . . . and other deleterious effects." *Id.* The plurality agreed with the Pennsylvania Supreme Court's assertion that this language indicated that the ordinance was designed to combat secondary effects. *See id.* at 290-92.

91. *See id.* at 296. The Court recognized that the ordinance "may place incidental burdens on some protected speech," but opined that so long as the ordinance was targeted at harmful secondary effects, then the ordinance was justified. *Id.* at 295. Justice Souter altered his position in *Barnes*, arguing that the city did not come forward with a proper showing of the purpose of the ordinance. *See id.* at 316-17 (Souter, J., concurring in part and dissenting in part); *see also* Pollock,

holding extended the secondary effects analysis to allow complete bans on conduct.[92]

Because the *Pap's* and *Barnes* decisions were plurality decisions, the Court's future treatment of laws restricting nude dancing remains unclear.[93] Some circuits, such as the Ninth Circuit in *BSA, Inc. v. King County*, have found that laws placing general bans on public nudity are unconstitutional.[94] Additionally, in *Triplett Grille, Inc. v. City of Akron*,[95] the Sixth Circuit held that a public indecency ordinance, similar to the one in *Barnes*, was facially unconstitutional because Akron failed to show a link between nudity in non-adult entertainment and harmful secondary effects resulting from that nudity.[96] Thus, the constitutionality of these adult entertainment regulations turns on whether the government had a substantial interest in enacting the regulation, apart from suppressing expres-

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supra note 52, at 172-73 (discussing Souter's opinion concurring in part and dissenting in part).

92. *See Pap's A.M.*, 529 U.S. at 295-96. In his dissenting opinion, Justice Stevens expressed his concern over the Court's use of the secondary effects doctrine to allow a total ban on expression. *See id.* at 322-23 (Stevens, J., dissenting). He believed that the holding "ha[d] the effect of swallowing whole a most fundamental principle of First Amendment jurisprudence." *Id.* at 323.

93. *See* Ken Kimura, Note, *A Legitimacy Model for The Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1596 (1992). Kimura states:

> The absence of a simple majority creates precedential uncertainty in plurality decisions. This precedential uncertainty may be seen as a function of three factors: (1) the difficulty in identifying a particular legal rule that a numerical majority of Justices support, (2) the difficulty in identifying a particular outcome that is justified in light of a single legal rule, and (3) the difficulty in explaining an adequate connection between the identified legal rule and the identified outcome.

Id.

94. *See* BSA, Inc. v. King County, 804 F.2d 1104, 1110 (9th Cir. 1986) (holding two ordinances prohibiting both obscene and non-obscene nude performances substantially overbroad and unconstitutional).

95. 40 F.3d 129 (6th Cir. 1994).

96. *See id.* at 135. Demonstrating that the public indecency ordinance banned all public nudity, including performances with literary, artistic or political value, the Sixth Circuit quoted Justice Souter's concurring opinion:

> It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of Renton-type adult entertainment was correlated with such secondary effects.

Id. at 136 (Souter, J., concurring) (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 585 n.2 (1991) (plurality opinion)). Accordingly, the Sixth Circuit concluded that the city failed to show that expressive nudity was linked to harmful secondary effects, and therefore, the court struck down the ordinance as substantially overbroad. *See id.*

sion, and whether there is a connection between the regulation and the government interest.[97]

IV. THE ELEVENTH CIRCUIT'S RATIONALE IN *RANCH HOUSE*

In *Ranch House, Inc. v. Amerson*,[98] the Eleventh Circuit vacated the district court's decision that two Alabama statutes, both placing restrictions on adult entertainment establishments, were constitutional and remanded to the district court for further proceedings.[99] The court first addressed the constitutionality of section 13A-12-200.11 of the Alabama Criminal Code ("section 200.11"), which prohibited the display of nudity by a "business establishment . . . for entertainment purposes."[100] The court then briefly discussed the constitutionality of section 13A-12-200.5(4) of the Code ("section 200.5(4)"), which restricted the location of adult businesses.[101]

A. Eleventh Circuit's Analysis of Section 200.11

The Eleventh Circuit began its analysis of section 200.11's constitutionality by deciding which level of scrutiny to apply.[102] To answer that question, the court had to determine whether section 200.11 was content-based or content-neutral.[103] Ranch House argued that the statute was a content-based regulation aimed at suppressing free expression, and therefore must be subject to strict

97. *See* Phillips v. Borough of Keyport, 107 F.3d 164, 173 (3d Cir. 1997) (en banc) (remanding to determine whether borough had interest to justify ordinance). In *Phillips*, the court remanded the case because the borough filed no answer showing its interest to justify the zoning ordinance at issue. *See id.* The court noted that the borough had the burden of producing evidence to show that it reasonably believed its interest would be achieved by enacting the ordinance. *See id.*

98. 238 F.3d 1273 (11th Cir. 2001).

99. *See id.* at 1288. Additionally, the court continued an existing injunction that prohibited the enforcement of the statutes against Ranch House's businesses. *See id.*

100. *Id.* at 1277, 1278-86 (quoting ALA. CODE § 13A-12-200.11 (Supp. 2001)). Sections 200.11 and 200.5(4) were recent amendments to the Alabama Anti-Obscenity Enforcement Act. *See id.* at 1276.

101. *See id.* at 1286-88. For a discussion of the court's analysis of section 200.5(4)'s constitutionality, see *infra* notes 129-38 and accompanying text.

102. *See Ranch House*, 238 F.3d at 1278. The court noted that the level of scrutiny in large part determines whether a statute is constitutional. *See id.*

103. *See id.* The court recognized that if the regulation was unrelated to the suppression of expression, then the regulation would only have to satisfy the less stringent *O'Brien* standard; conversely, if the regulation was related to the suppression of the expression, then the regulation would be subject to strict scrutiny. *See id.* (citing City of Erie v. Pap's A.M., 529 U.S. 277, 278 (2000) (plurality opinion)).

scrutiny.[104] The defendants countered this assertion by arguing that the statute was content-neutral and subject to the *O'Brien* intermediate scrutiny standard because it was not targeted at the protected expression, but rather at the harmful secondary effects associated with nude dancing.[105] The Eleventh Circuit decided that even though section 200.11 did not appear content-neutral, it could be considered content-neutral if there was a legislative purpose other than suppressing the nude expression.[106]

In making this determination, the Eleventh Circuit pointed to the secondary effects doctrine set forth in *City of Renton v. Playtime Theatres, Inc.*,[107] which maintains that a statute is not content-based if it is concerned with preventing the harmful effects that a certain message may have on its viewers.[108] The Eleventh Circuit cited its recent decision in *Sammy's of Mobile, Ltd. v. City of Mobile*[109] to further illustrate how the secondary effects doctrine could validate a statute that may appear content-based.[110] The court believed that

104. *See id.* at 1277-78. Ranch House argued that the statute would not only fail strict scrutiny, but also intermediate scrutiny because the statute was overbroad. *See id.* at 1278. The court noted that although Ranch House's arguments appeared to be facial attacks, those arguments may have merit in the form of as-applied challenges and brought as such on remand. *See id.* at 1277-78 n.2.

105. *See id.* The defendants did not make an argument that the statute could withstand strict scrutiny. *See id.*

106. *See id.* at 1278-79. The court first cited a recent Supreme Court decision to reiterate that a content-based regulation is present when the government aims at suppressing the particular message at issue. *See id.* at 1278 (citing Hill v. Colorado, 530 U.S. 703, 719-20 (2000)). The court then pointed out that even though a statute may refer to the content of the expression, it is not content-based if the government had some valid purpose other than suppressing the expression. *See id.*

107. 475 U.S. 41 (1986).

108. *See Ranch House*, 238 F.3d at 1279-80 (citing *Renton*, 475 U.S. at 46-48). According to the court, the secondary effects doctrine "is used to determine *whether* a statute is content-based, by looking for a legislative purpose independent of the legislature's hostility to the underlying message." *Id.* at 1280. In *Renton*, the Supreme Court used the secondary effects doctrine to uphold a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, park, school or church. *See Renton*, 475 U.S. at 46-48. The Court found that the ordinance was not directed at the content of films shown in these theaters, but at the harmful secondary effects of the theaters on the surrounding community. *See id.* at 47. For a further discussion of the Court's holding and rationale in *Renton*, see *supra* notes 65-69 and accompanying text.

109. 140 F.3d 993 (11th Cir. 1998).

110. *See Ranch House*, 238 F.3d at 1280 (citing Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir. 1998)). In *Sammy's*, the Eleventh Circuit upheld an ordinance that outlawed the display of nude performances in establishments licensed to sell liquor. *See Sammy's*, 140 F.3d at 998-99. The goal of the ordinance, as stated in the preamble, was to avoid "undesirable behavior . . . not in the interest of the public health, safety and welfare" and "disturbances associated with mixing alcohol and nude dancing. . . ." *Id.* at 995. The court rejected the argument that the ordinance was content-based because it referred to nude entertainment, stat-

examining the language of the statutes in cases such as *Renton* and *Sammy's* showed why section 200.11 was not content-based solely because it singled out nudity for entertainment purposes.[111]

Accordingly, the court examined the record to ascertain the Alabama Legislature's purpose in enacting the statute.[112] In doing so, the court found that there was not enough evidence to determine the legislature's actual purpose for restricting the display of nudity for entertainment purposes.[113] The court noted that, at first glance, the evidence suggested that section 200.11 was indeed content-based as Ranch House asserted.[114]

Seeking further to determine the legislature's intent, the court first analyzed the text of section 200.11.[115] It decided that the statute on its face appeared to not only expressly prohibit nudity at adult-oriented establishments, but also nudity in theaters or other establishments unrelated to adult entertainment.[116] The court also found that the introductory section of the bill, which added section 200.11, neither referred to nude dancing, nor classified establishments providing nude dancing as public nuisances.[117] The court added that the legislature separately included section 200.11 and section 200.5(4), the zoning provision, and that separation of the two provisions suggested that the legislature's purpose was not to prevent secondary effects.[118] Finally, the court considered the ex-

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ing that the Supreme Court "does not equate reference to content with suppression of content." *Id.* at 998.

111. *See Ranch House*, 238 F.3d at 1280. The Eleventh Circuit explained that if a statute expressly targets a particular form of nudity, it is relevant but not dispositive in assessing whether the statute intends to suppress expression. *See id.*

112. *See id.* at 1280-81. The court noted that the determination of a law's particular purpose may be achieved through examination of "a wide variety of materials, including the text of the statute, any preamble or express legislative findings associated with it, legislative history, and studies and information of which legislators were clearly aware." *Id.* at 1280 (citing Colacurcio v. City of Kent, 163 F.3d 545, 552 (9th Cir. 1998)).

113. *See id.* at 1281. The court sought to determine whether the legislature's purpose was to restrict the display of nudity for entertainment purposes because of its disagreement with the message or to "ameliorate the perceived negative effects of nude dancing venues on the safety, health, and welfare of the surrounding community." *Id.*

114. *See id.*

115. *See id.* at 1281. The court again noted that the text of section 200.11 targeted nude entertainment and not other displays of nude expression. *See id.*

116. *See Ranch House*, 238 F.3d at 1281 (noting statute's text did not demonstrate legislative purpose to combat secondary effects).

117. *See id.* (finding no specific language in introductory section of bill suggesting nude dancing constituted public nuisance).

118. *See id.* The court stated that even though the amended Act included a zoning provision, which is commonly justified as combating secondary effects, this

press legislative findings of section 200.11 and found the suggestion that the legislature's purpose was to suppress the message conveyed by nude dancing solely because of a disagreement with the expression.[119]

As a result, the court found that the defendants failed to produce evidence to support their secondary effects argument.[120] The court added that there was no precedent allowing a secondary effects argument to prevail without some indication that the legislature intended to prevent those effects.[121] Furthermore, the court

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inclusion would not necessarily mean that the legislature intended to battle secondary effects through section 200.11. *See id.*

119. *See id.* at 1281-82 (citing 1998 Ala. Acts 98-467, § 1). The legislative findings addressed by the court stated:

> The Legislature of Alabama finds and declares:
> (1) That in order to protect children from exposure to obscenity, prevent assaults on the sensibilities of unwilling adults by the purveyor of obscene material, and suppress the proliferation of "adult-only video stores," "adult bookstores," "adult movie houses," and "adult-only entertainment," the sale and dissemination of obscene material should be regulated without impinging on the First Amendment rights of free speech by erecting barriers to the open display of erotic and lascivious material.
> (2) That the premises in which a violation of the Act occurs should be declared a public nuisance.

Id. at 1282 (citing 1998 Ala. Acts 98-467, § 1). According to the court, the first finding applied only to displays of obscenity and not to non-obscene nude entertainment. *See id.* at 1281. The court believed that the second legislative finding added little to the analysis because it declared establishments, such as Ranch House, public nuisances due to their expression, but failed to mention their negative effects on the community. *See id.* at 1282. The court felt that these findings weakened the secondary effects argument by the defendants. *See id.* at 1281-82.

120. *See id.* at 1282. The court believed that the defendants failed to offer any legislative history or other record evidence because they believed they were not required to make a showing of the legislature's purpose. *See id.* According to the court, the defendants felt the court should rest on the assumption that the legislature's purpose was to prevent the negative effects these establishments would have on the public's health, safety and welfare. *See id.*

121. *See Ranch House*, 238 F.3d at 1282. The court compared various cases, including *Pap's* and *Renton*, that support the proposition that some indication of legislative intent exist to prevent secondary effects. *See id.* at 1282 n.4, 1284 (citations omitted). The court noted that although Justice Souter suggested in his *Barnes* concurrence that a statute could be justified by secondary effects even though its purpose was absent, he departed from this position in his *Pap's* concurrence; therefore, his position in *Barnes* did not support the defendants' argument. *See id.* (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582 (1991) (plurality opinion) (Souter, J., concurring) and City of Erie v. Pap's A.M., 529 U.S. 277, 316 (2000) (plurality opinion) (Souter, J., concurring in part and dissenting in part)). The court also believed the defendants' argument would permit a broad exception to the rule that a statute discriminating against particular speech on its face must be subject to strict scrutiny. *See id.* at 1283. Finally, the court explained that the defendants' argument would undermine the rule that the Government bears the burden of proving the constitutionality of its actions when restricting free expression. *See id.* (citing United States v. Playboy Entm't Group, 529 U.S. 803, 816 (2000)).

felt that allowing the defendants' argument to suffice would impose no burden on the government to invoke the secondary effects doctrine and would lessen the level of scrutiny for laws restricting protected rights.[122] The court, therefore, concluded that state actors must point to some meaningful indication, which may be found in the code's language or in the record of the legislative proceedings, that the statute's purpose was to combat harmful secondary effects of nude entertainment.[123]

Consequently, the court held that the defendants must develop an evidentiary foundation for their argument that section 200.11's purpose was to combat secondary effects.[124] Accordingly, the court decided to vacate the district court's judgment and remand the case to allow the defendants an opportunity to meet this burden.[125]

Although the court did not decide whether section 200.11 could survive intermediate scrutiny, the Eleventh Circuit suggested that Ranch House had substantial arguments to make it difficult for the statute to survive.[126] Specifically, the court found merit in Ranch House's argument that section 200.11's restrictions were greater than necessary to serve the government's interest because

122. *See id.* (concluding defendants' argument would permit broad proscription of protected speech).

123. *See id.* The court compared this rationale with *Renton*, wherein the Supreme Court found that the district court's determination of the city's legislative intent to prevent secondary effects was sufficient to justify the ordinance at issue. *See id.* (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)). For a discussion of *Renton*, see *supra* notes 65-69 and accompanying text. The court felt that although this burden on the defendants was minimal, it was important because the text of section 200.11 suggested that the Alabama Legislature's intent was to suppress expression. *See Ranch House*, 238 F.3d at 1283.

124. *See Ranch House*, 238 F.3d at 1284 (remanding case to allow defendants to provide evidentiary showing of statute's purpose).

125. *See id.* at 1284-86. The court had several reasons for remanding the case. *See id.* at 1284. First, Ranch House would be minimally prejudiced from continued delay in resolving its claim, provided that the court extend the existing injunction. *See id.* Second, the district court did not have a factual basis for invoking the secondary effects doctrine and remanding would allow one to be established. *See id.* Third, courts have been willing to remand in situations involving similar statutes. *See id.* Fourth, by remanding, the defendants could bring an as-applied challenge along with the facial challenge. *See id.* Fifth, the court wanted to give the attorneys representing Alabama an opportunity to be heard. *See id.*

126. *See id.* at 1285. The court first directed the district court on remand to apply the *O'Brien* intermediate scrutiny test. *See id.* (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968) and Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, 996 (11th Cir. 1998)). For a complete discussion of the test set forth in *O'Brien*, see *supra* notes 38-41 and accompanying text. The court mentioned that Ranch House's arguments regarding the first three factors of the *O'Brien* test "essentially dovetail" with its assertions concerning secondary effects, especially because the defendants lacked a foundation for their position. *See Ranch House*, 238 F.3d at 1285.

the terms "business establishment" and "for entertainment purposes" in the statute might include other non-adult establishments displaying nudity for serious artistic purposes.[127] The court hesitated to address the issue fully, leaving this task for the district court to determine on remand.[128]

B. Eleventh Circuit's Analysis of Section 200.5(4)

The Eleventh Circuit also briefly addressed the constitutionality of section 200.5(4).[129] Ranch House argued that this zoning provision was unconstitutional because it lacked an amortization period or grandfather clause that allowed time to conform to the zoning requirements.[130] Defendants responded that an amortization period was built into the statute.[131] Although the court decided not to rule on the constitutionality of section 200.5(4), it engaged in a general analysis of zoning ordinances under the First Amendment.[132]

The Eleventh Circuit explained that courts treat zoning ordinances that regulate adult entertainment as time, place and manner restrictions.[133] The court then examined prior cases to show it

127. *See Ranch House*, 238 F.3d at 1285. The court recognized that Ranch House's argument that the statute was overbroad on its face was substantial. *See id.* The court found that if the terms in the statute included for-profit establishments, "then a for-profit theater's performance of the musical *Hair* or another play in which nudity plays a prominent and stylistically meaningful role might well be considered a display of nudity by a business establishment for entertainment purposes." *Id.* If this is the case, the court felt that the statute would be greater than necessary to advance the state's interest and should be struck down. *See id.*

128. *See id.* at 1285-86 (indicating that both parties should have opportunity to argue whether section 200.11 survives scrutiny).

129. *See id.* at 1286 (examining whether zoning provision violates First Amendment).

130. *See id.* at 1286 (discussing Ranch House's argument against constitutionality of section 200.5(4)).

131. *See id.* The court noted that section 200.5(4)'s authorizing bill delayed the effective date of the statute until "'the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.'" *Id.* (quoting 1998 Ala. Acts 98-467, § 9). Otherwise, section 200.5(4) itself did not expressly contain an amortization period or grandfather clause. *See id.* For a further discussion of amortization periods and grandfather clauses, see *supra* note 54 and accompanying text.

132. *See Ranch House*, 238 F.3d at 1286-88.

133. *See id.* at 1286. The court added that these ordinances are constitutional if they are "narrowly tailored to further a substantial government interest and 'allow for reasonable alternative avenues of communication.'" *Id.* For a discussion on the time, place and manner test, see *supra* notes 43-44 and accompanying text. Ranch House argued that section 200.5(4) failed the time, place and manner test because the First Amendment requires the inclusion of amortization or grandfather clauses to allow existing businesses time to conform to the zoning requirements. *See Ranch House*, 238 F.3d at 1286. Ranch House argued that the absence

had never previously ruled that the First Amendment requires the inclusion of grandfather or amortization clauses in zoning regulations.[134] The court noted that other courts have assumed that these zoning restrictions must include grandfather or amortization clauses that are reasonable.[135] According to the court, determining the reasonableness of these clauses should fall within the context of as-applied challenges, not facial challenges.[136]

Because it was unclear to the court whether Ranch House brought an as-applied challenge in reference to section 200.5(4), the Eleventh Circuit remanded this issue to the district court for resolution.[137] Additionally, the court felt that remanding would allow the district court to engage in necessary fact-finding to determine the section 200.5(4) issue.[138]

V. CRITICAL ANALYSIS OF THE ELEVENTH CIRCUIT'S RATIONALE

The outcome in *Ranch House* exemplifies a court's difficulty in ascertaining a legislature's intent.[139] In light of the murky precedent underlying the constitutionality of laws that regulate nude entertainment, it is not surprising that the Eleventh Circuit declined

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of these clauses would suppress protected speech and violate the First Amendment. *See id.*

134. *See Ranch House*, 238 F.3d at 1286. By citing a previous Eleventh Circuit case, the court opined that the Constitution does not require the inclusion of waiver provisions or grandfather clauses for existing businesses. *See id.* (citing David Vincent, Inc. v. Broward County, 200 F.3d 1325, 1333 (11th Cir. 2000)). The Eleventh Circuit noted that courts have frequently upheld zoning ordinances containing amortization periods. *See id.* (citing *David Vincent*, 200 F.3d at 1333 n.11).

135. *See id.* at 1286. The court explained that in *David Vincent*, the zoning provision included a five-year amortization clause, which was considered a reasonable time period. *See id.* The court then pointed to a number of cases that have assumed zoning laws targeting protected expression must include these clauses. *See id.* at 1286-87.

136. *See id.* at 1287 (noting Ranch House's argument is better understood under as-applied challenge and not facial challenge).

137. *See id.* The court refrained from offering an opinion on the merits of Ranch House's argument. *See id.* The court stated that the constitutional foundation for the requirement of amortization and grandfather clauses in zoning provisions remained unclear, and therefore should be addressed on remand. *See id.*

138. *See id.* at 1287-88. The court felt that fact-finding was necessary to address Ranch House's other arguments. *See id.* Specifically, Ranch House argued that the lack of an amortization period would immediately require its business to close, and this closing would deny the public access to protected nude entertainment. *See id.* The court decided that this issue was for the district court to address on remand. *See id.*

139. *See Ranch House*, 238 F.3d at 1284 (deciding to remand to allow Alabama Legislature opportunity to present case); *see also* Raban, *supra* note 34, at 576-77 (explaining difficulties courts have in determining legislature's intent).

to strike down section 200.11 as unconstitutional.[140] Nonetheless, there are several different routes that the Eleventh Circuit could have taken in analyzing the constitutionality of the statute.[141]

A. Upholding Section 200.11

Although there was not an ample evidentiary showing in *Ranch House* that section 200.11's purpose was to prevent the harmful secondary effects of nude entertainment, the court could have upheld the statute under the Supreme Court's decisions in *Barnes v. Glen Theatre, Inc.* and *City of Erie v. Pap's A.M.*[142] Under *Barnes*, the Eleventh Circuit could have declared the statute to be a valid exercise of police power, designed to protect public order and morality.[143] In *Barnes*, the Supreme Court upheld a statute prohibiting all public nudity, even without evidence of the Indiana Legislature's intent.[144] The Court justified the statute solely because Indiana's past public indecency statutes have historically been considered constitutional attempts to protect societal order and morality.[145] Applying this rationale, the Eleventh Circuit could have upheld section 200.11 without an ample showing by the government of the statute's purpose.

A problem would arise in relying on *Barnes*, however, because there the Indiana public indecency statute prohibited all nudity in general.[146] Under the plurality's interpretation, the statute was not directed at a particular form of nude expression because of a disa-

140. *See* Howard, *supra* note 5, at 897 (discussing confusion resulting from Supreme Court's holding in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (plurality opinion)).

141. For a discussion of the arguments in favor of section 200.11's constitutionality, see *infra* notes 142-56 and accompanying text. For a discussion of the arguments favoring striking down the statute as unconstitutional, see *infra* notes 157-69 and accompanying text. Because section 200.11 was the defining issue in the Eleventh Circuit's analysis and holding, this critical analysis will focus solely on that section.

142. *See* Ward v. County of Orange, 217 F.3d 1350, 1353 (11th Cir. 2000), *cert. denied*, 531 U.S. 1149 (2001) (citing *Pap's* to uphold zoning and licensing ordinances aimed at negative secondary effects of adult establishments); Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, 997-98 (11th Cir. 1998) (using *Barnes* analysis to uphold ordinance banning nude dancing in establishments selling liquor).

143. *See Barnes*, 501 U.S. at 569. In *Barnes*, the Supreme Court upheld a public indecency statute that banned public nudity as an exercise of the police power designed to protect morals and public order. *See id.*

144. *See id.* at 567-68 (applying *O'Brien* analysis to Indiana public indecency law).

145. *See id.* at 568-69 (reviewing prior Indiana public indecency statutes).

146. *See id.* at 570-71 (noting that statute does not suppress erotic message).

greement with its message.[147] In *Ranch House*, section 200.11 prohibited nudity for entertainment purposes.[148] Therefore, to avoid the argument that section 200.11 was content-based, the Eleventh Circuit would have had to rely on the Supreme Court's use of the secondary effects doctrine in *Pap's*.[149]

Although the Eleventh Circuit did rely on *Pap's* in its opinion, the context of this application flawed the court's reasoning.[150] The court cited *Pap's* to support its interpretation that precedent required a proper showing of legislative intent.[151] The court also noted that Justice Souter's concurrence in *Barnes*[152] did not help Ranch House's argument because he retreated from that position in *Pap's*.[153] In doing so, the Eleventh Circuit failed to acknowledge

147. *See id.* In its explanation that the statute was not directed at nudity because of a disagreement with its message, the Court stated: "[t]he appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it." *Id.* at 571.

148. *See* Ranch House v. Amerson, Inc., 238 F.3d 1273, 1281 (11th Cir. 2001) (noting section 200.11 only targeted nude entertainment and not other nude expression).

149. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 291 (2000) (plurality opinion) (deciding ordinance, prohibiting public nudity, was justified because of its focus on negative secondary effects of nude dancing); Colacurcio v. City of Kent, 163 F.3d 545, 553 (9th Cir. 1998) (concluding ordinance imposing distance requirements between nude dancers and patrons was constitutional without mention of speech); Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, 999 (11th Cir. 1998) (finding ordinance banning nude dancing where alcohol was sold justified by secondary effects doctrine).

150. *See Ranch House*, 238 F.3d at 1282 n.4 (citing *Pap's*, 529 U.S. at 290).

151. *See id.* at 1282. In *Pap's*, the Supreme Court found that the preamble to the ordinance was sufficient to establish that the legislative purpose was to prevent the negative secondary effects associated with nude entertainment. *See Pap's*, 529 U.S. at 290. The preamble stated that the ordinance was adopted:

> [F]or the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

Id. Cf. Ranch House, 238 F.3d at 1281. In *Ranch House*, the legislative findings of the bill adding section 200.11 were insufficient to determine whether the legislature's intent was aimed at secondary effects, although the Eleventh Circuit suggested the intent was aimed at suppressing expression. *See id.* at 1281-82. For a discussion of the findings, see *supra* note 119 and accompanying text.

152. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582-84 (1991) (Souter, J., concurring). In his concurrence in *Barnes*, Justice Souter felt that the government did not have to provide affirmative evidence of an intent to combat harmful secondary effects. *See id.* Several years later in *Pap's*, he disagreed with the plurality's reasoning to uphold the regulation because he felt that the government did not produce sufficient evidence to justify the law. *See Pap's*, 529 U.S. at 310-11 (Souter, J., concurring in part and dissenting in part).

153. *See Ranch House*, 238 F.3d at 1282 n.4. In a footnote, the Eleventh Circuit acknowledged that Justice Souter departed from his *Barnes* concurrence in *Pap's*.

that Justice Souter wrote a separate opinion in *Pap's* precisely because he felt that the plurality was incorrect in upholding the regulation without a sufficient evidentiary showing of its purpose.[154] Thus, the plurality in *Pap's* disregarded the need for an adequate display of the regulation's purpose in upholding the regulation.[155] The Eleventh Circuit could have emphasized this aspect of the *Pap's* decision heavily and upheld section 200.11 for targeting harmful secondary effects, even without support in the record. Nonetheless, the court instead chose to exercise caution by remanding in order to provide the defendants a second chance to justify section 200.11.[156]

B. Striking Down Section 200.11

It would have been easier for the Eleventh Circuit to strike down section 200.11. The court could have found the statute to be unconstitutionally overbroad because it restricted both obscene and non-obscene nude entertainment.[157]

The Eleventh Circuit could have relied more heavily on the Supreme Court's holding in *Schad v. Borough of Mt. Ephraim.*[158] In *Schad*, the Court invalidated an ordinance that prohibited all live entertainment in the borough, including nude dancing.[159] The Court found that because the ordinance excluded both obscene and non-obscene nude dancing, it could not pass intermediate

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See id. The court decided it would not follow Justice Souter's approaches, but would instead follow the approach of looking solely at the law to find the governmental interest at stake, as the Supreme Court did in *Renton*. *See id.* The Eleventh Circuit failed to mention that the plurality in *Pap's* upheld the ordinance without a proper display of its purpose. *See Pap's*, 529 U.S. at 313-14 (Souter, J., concurring in part and dissenting in part) (noting plurality upheld ordinance without sufficient evidence of its purpose).

154. *See Ranch House*, 238 F.3d at 1282 n.4 (citing *Pap's*, 529 U.S. at 310-11 (Souter, J., concurring in part and dissenting in part)).

155. *See Pap's*, 529 U.S. at 313-14 (Souter, J., concurring in part and dissenting in part). Justice Souter noted that the plurality relied on the materials in the record, but those materials were not enough to justify the ordinance. *See id.* Justice Souter added that the evidence considered must be "a matter of demonstrated fact, not speculative supposition." *Id.* at 314.

156. *See Ranch House*, 238 F.3d at 1284.

157. *See id.* at 1281 (noting section 200.11 seemed to prohibit not only nudity at adult-oriented businesses but also nudity showcased at theaters and money-making entertainment venues).

158. 452 U.S. 61 (1981).

159. *See id.* at 76 (concluding ordinance unconstitutional because no sufficient alternatives of communication).

scrutiny.[160] Accordingly, the Eleventh Circuit could have adopted the reasoning of *Schad* to strike down section 200.11.[161]

The Eleventh Circuit could have also cited the decisions of other circuits to declare section 200.11 unconstitutionally overbroad.[162] In *Triplett Grille, Inc. v. City of Akron*, the Sixth Circuit invalidated an ordinance that banned all public nudity, including non-adult nude entertainment.[163] The Sixth Circuit determined that the City of Akron failed to show that non-adult entertainment and harmful secondary effects were causally related, and accordingly, found the ordinance unconstitutional.[164] Also, in *BSA, Inc. v. King County*, the Ninth Circuit decided that two ordinances prohibiting barroom nude dancing were unconstitutional.[165] As the Sixth Circuit did in *Triplett*, the Ninth Circuit found the ordinances overbroad because they restricted nude expression protected by the First Amendment.[166]

The most powerful argument for finding section 200.11 violative of the First Amendment, therefore, is that it prohibits both unprotected and protected expression.[167] As Justice Souter remarked about the statute in *Barnes*, "[i]t is difficult to see . . . how the enforcement of Indiana's statute against nudity in a production of 'Hair' or 'Equus' . . . would further the State's interest in avoiding harmful secondary effects . . . ."[168] The Eleventh Circuit acknowl-

160. *See id.* (distinguishing Young v. Am. Mini Theatres, 471 U.S. 50, 71 n.5 (1976)).

161. *See* BSA, Inc. v. King County, 804 F.2d 1104, 1108 (9th Cir. 1986) (citing *Schad* to subject regulation banning nude dancing to strict scrutiny); Malmer, *supra* note 53, at 1278 (discussing lower courts' reliance on Supreme Court's holding in *Schad*).

162. *See* Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 135-36 (6th Cir. 1994) (striking down ordinance banning all public nudity); *BSA*, 804 F.2d at 1109 (holding ordinance prohibiting nude dancing violative of First Amendment).

163. *See Triplett Grille*, 40 F.3d at 135-36 (concluding ordinance prohibiting all public nudity violated First Amendment because impermissibly overbroad).

164. *See id.* at 135. The Sixth Circuit noted that the ordinance prohibited "all public nudity, including live performances with serious literary, artistic, or political value." *Id.* at 136.

165. *See BSA*, 804 F.2d at 1110 (finding two counties' ordinances that regulated barroom nude dancing substantially overbroad).

166. *See id.* The ordinances, which prohibited public nudity, excluded from their reach nudity in expressive dance, drama, athletic locker rooms and science and educational classes. *See id.* The Ninth Circuit found that by narrowing the category of protected expression, the ordinances were substantially overbroad because non-obscene nudity was unprotected. *See id.*

167. *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76 (1981) (striking down ordinance as overbroad because it prohibited both protected and non-protected expression).

168. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 585 n.2 (1991) (plurality opinion) (Souter, J., concurring).

edged this argument in its opinion, but should have relied more heavily on Justice Souter's reasoning.[169] As a result, instead of remanding, the Eleventh Circuit could have struck down section 200.11 as unconstitutional.

VI. RAMIFICATIONS OF THE NINTH CIRCUIT'S DECISION IN *RANCH HOUSE*

The secondary effects doctrine has become the safety net for legislatures enacting statutes that appear content-based.[170] Along with the holding in *Ranch House*, the doctrine gives legislatures wide latitude in drafting laws that regulate adult entertainment.[171] Moreover, allowing legislatures another chance to explain their intent can result in a showing of artificial intent.[172] Although this result may be mere speculation, the prospect of such occurrence is reason for concern.[173]

The Eleventh Circuit's holding in *Ranch House* also typifies the deference courts tend to give legislative decisions by using the secondary effects doctrine.[174] Moreover, the holding in *Ranch House* demonstrates that a higher court's reliance on the secondary effects doctrine will burden lower courts by requiring them to conduct fur-

169. *See* Ranch House, Inc. v. Amerson, 238 F.3d 1273, 1285 (11th Cir. 2001) (noting section 200.11 may prohibit nudity for non-adult entertainment purposes).

170. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 323 (2000) (Stevens, J., dissenting) (arguing use of secondary effects doctrine allows government to totally ban expression); Pollock, *supra* note 52, at 176 (arguing *Pap's* decision permits government to ban clear expression upon showing some deleterious effects involved).

171. *See Pap's A.M.*, 529 U.S. at 323 (Stevens, J., dissenting). Justice Stevens argued that legislatures can justify laws banning expression because the negative effects may only "happen to be associated" with the expression. *Id.*

172. *See id.* (Stevens, J., dissenting) (arguing legislatures may intend to suppress expression but courts will still continue to uphold law under secondary effects doctrine); Raban, *supra* note 34, at 566 (discussing unlikelihood of content-based restrictions being solely directed at preventing other harms).

173. *See* Raban, *supra* note 34, at 569. Raban suggests that the secondary effects doctrine is faulty because it allows judges, not the legislature, to determine the purpose of a regulation. *See id.* Raban argues "[n]othing more than a bare determination by nonelected government officials that the purpose of a particular regulation is acceptable distinguishes secondary-effects regulations from other regulations of speech." *Id.*

174. *See* United States v. O'Brien, 391 U.S. 367, 383 (1968) (explaining principle of constitutional law that Court will not strike down statute based on illicit motive); Raban, *supra* note 34, at 567 (arguing secondary effects doctrine allows courts to simply allow content-based legislation to stand with nothing more than cursory inquiry).

ther inquiries into the legislature's intent.[175] If the Eleventh Circuit struck down the statute, the result would have ensured that legislatures would pass carefully drawn laws.[176] In those cases, the impact on legislatures would not be severe because they could simply rewrite the law.[177] Conversely, if a court upholds a statute such as section 200.11 because it targets secondary effects, the implications on First Amendment jurisprudence would be severe.[178] With the Eleventh Circuit's reluctance to decide the constitutionality of the statutes in *Ranch House*, courts will continue to rely too heavily on the secondary effects doctrine.[179]

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175. *See* Ranch House, Inc. v. Amerson, 146 F. Supp. 2d 1180, 1200-03 (N.D. Ala. 2001) (conducting review to determine whether section 200.11 targeted negative secondary effects). On remand, the district court upheld section 200.11 as targeting harmful secondary effects because of testimony by the senator that sponsored the bill adding the statute. *See id.* at 1202. The court found the testimony of Alabama State Senator Tom Butler credible. *See id.* Senator Butler testified that he sponsored the bill because of "problems that had been growing in Madison County since about 1991 with the proliferation of clubs outside the corporate limits of Huntsville to the rural areas." *Id.* at 1189-90. He also obtained reports from the Madison County sheriff that explained emergency responses from club-related occurrences. *See id.* at 1190. The district court relied on this testimony and the reports to uphold section 200.11, finding it targeted the harmful secondary effects of nude dancing. *See id.* at 1202. The court also upheld section 200.5(4) as facially constitutional as-applied to Ranch House because it left open reasonable means of communication. *See id.* at 1212-13; *see also* Phillips v. Borough of Keyport, 107 F.3d 164, 173 (3d Cir. 1997) (en banc) (remanding to determine whether ordinance justified without reference to speech).

176. *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 79 (1981) (Powell, J., concurring) (noting ordinance not carefully drawn to pass as sufficient justification for restricting protected expression).

177. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 594 (1991) (plurality opinion) (White, J., dissenting) (stating legislatures should adopt restrictions narrowly drawn that allow expressiveness of non-obscene entertainment).

178. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 322 (2000) (plurality opinion) (Stevens, J., dissenting) (explaining use of secondary effects rationale to allow total ban on expression has serious impact on First Amendment principles); *see also* Note, *supra* note 4, at 1920 (arguing limitation on secondary effects doctrine furthers goals of Court's approach to First Amendment questions).

179. *See Pap's*, 529 U.S. at 322 (Stevens, J., dissenting) (arguing secondary effects doctrine not intended to justify total bans on expression); Pollock, *supra* note 52, at 176 (arguing secondary effects doctrine applied in areas that creators did not imagine); *see also* Note, *supra* note 4, at 1922-23 (arguing courts' misuse of secondary effects doctrine could allow legislators to justify content-based restrictions).